Cornell Law Review

Volume 14
Issue 2 *February 1929*

Article 2

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A REMEDY FOR ELECTION OF REMEDIES: A PROPOSED ACT TO ABOLISH ELECTION OF REMEDIES

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"The doctrine of election of remedies, as heretofore known, is abolished. A litigant, unless estopped by his conduct, or by a former adjudication, or by law otherwise prevented, shall not be foreclosed from a determination of the merits of his cause or defense. For the purposes of this statute, a former adjudication shall include any judgment on the merits, on the facts in controversy, irrespective of the form of the action or the relief obtainable."

The doctrine of election of remedies has long been the subject of severe and deserved criticism. Mr. Hine's article, published in the *Harvard Law Review* in 1913,[1] was a masterly and prophetic presentation of the defects in its reasons and operation, which has been entirely justified by subsequent judicial experience. His caustic characterization of this parasitic growth, couched in the metaphor of gardening technique, will bear repetition:

"The result of this review of the operation and history of the doctrine may be summed up in this way: The modern rule of election of remedies is a weed which has recently sprung up in the garden of the common law, its roots stretching along the surface of *obiter dicta* but not reaching the subsoil of principle. The judicial gardeners, through whose carelessness it has crept in, should be able to eliminate it, or, at least, to prevent its further growth."

The difficulty was and is, however, that judicial gardeners do not weed the fields of the law. Such is not their function. They sow the seeds of legal doctrine—both those which flower and those which sour. Once planted, however, all receive similar treatment. Nothing, except in rare instances, is ever rooted out. Few, indeed, and rare, are the cases expressly overruling prior erroneous judicial decision. In the fertile soil of legal reasoning, accelerated and encouraged by dictum, both judicial and obiter, the weeds of error grow side by side with the flowers of correct principle, until the weeds crowd out the flowers. Even when an occasional industrious judicial gardener clears his patch, he fails to watch carefully for the weed ever cropping out, or, if he does, it is impossible for him to keep it clear, by reason of the ill-kept patches with which he is surrounded, and, gradually, his

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[1]Hines, *Election of Remedies; A Criticism* (1913) 26 HARV. L. REV. 707.

open space is enclosed, crab grass overruns it, and there is nothing that can be done, except to plough and turn the soil, and start anew.

To recognize these facts, is not unduly to criticize the instrumentalities of the growth of the law. Such is the nature of the judicial process, and we would not have it otherwise. Until the seeds have sprouted and shown their superfoliage, the beneficent growth cannot be distinguished from the malignant. To root out prematurely is at too great a risk that the good may go with the bad. Stability is worth the price of delay and even of discomfort. But when the fact is ascertained, weeding is not enough. There must be a new start. Symmetry must be restored.

Such is the present condition of the law, with respect to the doctrine of election of remedies. The time has come when it is necessary to plough the ground, turn over the soil and start anew.

We do not propose, in this article, to review the origins of the doctrine of election of remedies, or the logic, or, rather, lack of logic, supporting it. Nor do we propose to contrast the widely varying rules in the several states, as to what constitutes an election of remedies; *i.e.*, whether it is the inadvertent choice of remedy resulting in the ill-omened action, or whether it is persistence in that choice, after warning fairly given and rashly disregarded. All of that has been done well and sufficiently, both in judicial opinion and legal criticism.[2]

Our purpose is not of exposition, but of evangelical mission. Scholarship of research has made plain the malady and its consequences. The time has come for a remedy for the election of remedies.

In order to present that remedy, something of the anatomy of the subject and its embryological development, must be appreciated. It is only in the light of recent judicial decisions that the need for a definite and drastic solution becomes apparent.

Election of remedies has its roots in the supposed operations of legal logic:

> "It is only applicable 'when a choice is exercised between remedies which proceed upon irreconcilable claims of right' (*American Woolen Co. v. Samuelsohn*, 226 N. Y. 61); 'where there is, by law, or by contract, a choice between two remedies'

[2]There have been many contributions on this subject. Illuminating discussions of principles and decisions are to be found in KEENER, QUASI-CONTRACTS, Mr. Hines' article above referred to, and also, Corbin, *Waiver of Tort and Suit in Assumpsit* (1910) 19 YALE L. J. 221; Deinard and Deinard, *Election of Remedies* (1922) 6 MINN. L. REV. 341, 480. See also Schenck v. State Line Telephone Co., 238 N. Y. 308, 144 N. E. 592 (1924).

(*Henry v. Herrington*, 193 N. Y. 218). One may not both affirm and disaffirm a contract (*Conrow v. Little*, 115 N. Y. 387), or take a benefit under an instrument and repudiate it (*Haydock v Coope*, 53 N. Y. 68). One may not treat the possessor of his land both as tenant and as trespasser (*Stuyvesant v. Dairs*, 9 Paige, 427). A plaintiff must choose to regard a defendant either as a corporation or a partnership (*Clausner v. Head*, 110 Wis. 405). In short, one may not invoke the aid of the court upon inconsistent theories. (*Crossman v. Universal Rubber Co.*, 127 N. Y. 34)."[3]

But logical contradiction or inconsistency is not always an election of remedies. A mistaken remedy is contradictory of the correct one,—yet, in law, not inconsistent with it. So, one may sue in deceit and thereafter sue for breach of contract.[4] Indeed, a cause of action for fraud inducing a contract, may be joined with one for breach of that contract.[5] Yet, causes of action which are constituents of a possible election of remedies, cannot be joined.[6] Similarly, an action for conversion, mistakenly assumed to exist, does not bar a subsequent action in contract, involving the same subject matter.[7]

It is a fair summary of the cases to say, that there is no room for the operation of the doctrine of election of remedies unless, on the same evidentiary facts in controversy, unsupplemented by subsequent acts required to afford a particular remedy, there is a choice of logically inconsistent and, therefore, irreconcilable modes of relief. A contradiction in the evidentiary facts makes wholly impossible the risk of an election of remedies.

So, a defrauded vendee, who has *actually been defrauded*, may sue at law for deceit, or at law for money had and received, or in equity for rescission.[7a] Having made his choice, he is bound by it.[7b] The evidentiary facts in all three remedies are identical. True, if the defrauded vendee would sue at law for money had and received, he must supplement the facts in controversy by a subsequent tender of that which he received, and, similarly, if he would sue in equity for a rescission, he must, in his complaint, allege that he is ready, able

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[3]Quotation from opinion of Andrews, J., in Metropolitan Life Ins. Co. v. Childs Co., 230 N. Y. 285, 130 N. E. 295 (1921).

[4]Titus v. Poole, 145 N. Y. 414, 40 N. E. 228 (1895).

[5]France & Canada S. S. Corporation v. Berwind-White Coal Mining Co., 229 N. Y. 89, 127 N. E. 893 (1920).

[6]Hill v. McKane, 71 Misc. 581, 128 N. Y. Supp. 819 (Sup. Ct. 1911); Merry Realty Co. v. Shamokin & Hollis R. E. Co., 230 N. Y. 316, 130 N. E. 306 (1921).

[7]Independent Electric Lighting Corporation v. M. Brodsky & Co., 118 Misc. 561, 194 N. Y. Supp. 1 (Sup. Ct. 1922).

[7a]Gould v. The Cayuga County National Bank, 86 N. Y. 75 (1881).

[7b]Moller v. Tuska, 87 N. Y. 165 (1881).

and willing to return that which he received, but these are subsequent requirements, peculiar to the remedy and not inherent in the wrong which requires redress.

On the other hand, if the said vendee was mistaken in charging that there was fraud, he is not bound by his choice, because the evidentiary facts supporting the remedies available to him were not identical, and he may resort to other modes of relief.[7c] He has merely mistaken his remedy.

But the inevitable risk of unerring prevision as to what the court will say were the facts, is the plaintiff's, and though he must elect his remedy, at his peril, at the commencement of the action,[7d] it is not until the conclusion thereof that he can expect confirmation of the accuracy of his choice. Defendant, however, may lie in wait for the announcement of the fatal slip in technique, and may register victory, under the rules of the game, irrespective of the merits.

It is thus apparent that the logic of the law leads to most illogical results, if the standard of measurement is the doing of justice. Yet, it is this supposed logic which underlies the theory of our doctrine of election of remedies.

Terry v. Munger[8] is the most striking example of the supposed rule of logic. A tort had been committed by three individuals, in misappropriating property of the plaintiff. Plaintiff had recovered a judgment against two of them, in a contract form of action, by the fiction of waiver of tort. The judgment proved uncollectible. Plaintiff, thereupon, sued the third tortfeasor, but this time in the form of action known as conversion. He was said to have elected his remedy and that this was so "not by way of estoppel,"[9] but because "the plaintiff had elected to treat the taking of this property as a sale."[10] Nor was it material that the case had gone to judgment.

> "The proof that an action of that nature had in fact been commenced would have been just as conclusive upon the plaintiffs upon the question of election. . . as would the judgment have been. It was not necessary that a judgment should follow upon the action thus commenced."[11]

It was thought that plaintiff was maintaining logically contradictory positions. The discontinuance of the action would have been immaterial.

> ". . . it was of no consequence . . . whether plaintiffs did or did not make their choice effective. . . When it becomes

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[7c] *Supra* note 4. [7d] Matter of Garver, 176 N. Y. 386, 68 N. E. 667 (1903).
[8] 121 N. Y 161, 24 N. E. 272 (1890). [9] *Ibid.*, at 167.
[10] *Ibid.* [11] *Ibid.*

necessary to choose between inconsistent rights and remedies, the election will be final, *and cannot be reconsidered*, even where no injury has been done by the choice, or would result from setting it aside."[12]

The court concluded:

"*And this is not the least upon the principle of equitable estoppel.* It is upon the principle that the plaintiffs, by their own free choice, decided to sell the property, and, having done so, it necessarily follows that they have no cause of action against defendant for an alleged conversion of the same property by the same acts which they had already treated as amounting to a sale."[13]

Accordingly, the result in *Terry v. Munger* cannot be justified under the doctrine of *res judicata*. To the application of that doctrine, it would have been an insuperable objection that the parties to the action under consideration, were not those bound by the previous judgment.

It was not estoppel, but logic, which supported the rule.

Yet, thirty-four years later, in *Schenck v. State Line Telephone Co.*,[14] the same court said:

"Indeed it is probable that some element either of ratification or estoppel is at the root of most cases, if not all, in which an election of remedies, once made, is viewed as a finality."[15]

Accordingly, it was held that a defrauded plaintiff, who had mistakenly sued in deceit, which remedy was barred by the statute of limitations, might discontinue that action and sue in equity for rescission. The court said:

"The plaintiff is not charged to have signified a will to ratify except by signifying a will to sue. He is not charged to have evinced a readiness that the transaction should be allowed to stand except in conjunction with a demand that damages be paid, and upon the tacit but implied condition that the demand should be obeyed. The purchasers thwarted the condition. They now attempt to ignore it, as if the will to ratify had been absolute. The plaintiff said in effect: 'I wish to recover damages and on that basis to affirm.' The defendants in effect answer: 'Your right to damages is gone, but because you have ventured to ask for them, you forfeit everything else.' We think the nullification of the condition must draw with it as a consequence the nullification of the choice. The failure of one destroys the significance of the other as an expression of the will.

We reach the same conclusion if we apply to the abortive choice the principles by which courts of equity are governed when they relieve against mistake."[16]

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[12] *Ibid.*, at 168. (italics the writer's).
[13] *Ibid.*, at 169. (italics the writer's).
[14] *Supra* note 2.
[15] *Ibid.*, at 312.
[16] *Ibid.*, at 313 (italics the writer's).

The intimation was strong that, in any event, a discontinuance of the first election was of decisive significance. It was not immaterial that "Repentance, for all that the pleadings show, followed swiftly upon warning."[17]

The rule of logic finds here no idol worshipper. Logically applied, the effect of this argument would entirely destroy the doctrine of election of remedies. The affirmance of any contract would, in fact, be disproved by the theory expressed, of "conditional" intention.

Surely, the plaintiff in *Terry v. Munger* did not receive the benefit of such kindly consideration. In that case, the court did not concern itself with whether or not the plaintiff actually *intended* to pass the title to his property only in the event that he received compensation. It was enough that plaintiff had selected a remedy, the logical and legal effect of which was to pass title to the converted merchandise, though, in fact, no such intention was in the plaintiff's mind. Indeed, whether he sued in contract or in tort, he would be relying on the same facts and seeking the same relief. In either form of action, he would have to prove conversion, or fail, and in either form of action, he would receive a judgment for money damages. Waiver of the underlying tort, in the factual sense, he never contemplated nor even appreciated as possible. Yet, by his inadvertent choice of one remedy, he barred himself from a more effective one, and would have done so, even if he had not prosecuted the first to effect.

However complacent we may be at such a disposition of the rights of litigants, we cannot remain so in jurisdictions where we have been congratulated upon the projected miracles of procedural simplification, promised, if not accomplished, by the ambiguous oracle of the Code of Civil Procedure and its successor, the Civil Practice Act—that "There is only one form of civil action. . . ."[18]

From the rule of logic to the equitable rule of estoppel is indeed a far cry. From an attitude of utter indifference to consequences,—to solicitude that injustice shall not result, is praiseworthy indeed.

But, is it true? The Court of Appeals, in the *Schenck* case, did not weed the garden. The authority of *Terry v. Munger* was not disturbed. It was not even mentioned. The judicial process does not envelop the entire area of infection; it proceeds case by case, marking its progress by painful inclusion and exclusion, cautious that it does not unwittingly foreclose other litigants from their day in court, and leaving to future litigants to ascertain whether what is said in a given case is dictum to be abandoned, or decision for guidance.

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[17] *Ibid.*, at 312.

[18] N. Y. Civ. Prac. Act, § 8.

Nor is the effect of these remarks lessened by later experience.

In *Clark v. Kirby*,[19] plaintiffs commenced an action for rescission of a contract, by reason of alleged fraudulent representations on the part of the defendants. One defendent, Souders, was not served. Thereafter, plaintiffs commenced an action in Missouri against one of the defendants in the New York action and one Corbin, who was not a defendant in New York. Thereafter, Souders was served in the New York action. When Souders was served in New York, he alleged that, by reason of the Missouri proceedings, there had been an election of remedies. The Appellate Division ordered plaintiffs to reply.[20] Plaintiffs replied that the Missouri action was not one for damages for fraud; that the Missouri and New York actions were not inconsistent; that the Missouri action was unauthorized except as against Corbin; that, according to the laws of Missouri, an action for rescission and for damages may be maintained at the same time; that the Missouri action had been discontinued before trial. The Appellate Division, in ordering the reply, had discussed the merits of Souders' defense. It said that though plaintiffs had disaffirmed the transaction in New York, yet, having sued in Missouri to recover damages, they had made an irrevocable election to affirm the transaction. "If he choose the latter remedy (rescission) he must act promptly, '*announce his purpose and adhere to it*,' and not by acts of ownership continue to assert right and title over the property as though it belonged to him."[21] On the trial, the complaint was dismissed on the pleadings. The Court of Appeals reversed the judgment for these reasons:

> "(1) The New York action was an action for rescission. This constituted the election of remedies, not the later action brought in Missouri. (2) The reply served to the affirmative defenses set up in the answer raised issues of fact as to waiver and an abandonment which required a trial on the merits. (3) The Missouri action was not as a matter of law a waiver or an abandonment of rescission; neither was it inconsistent with the claim of rescission. (4) Even if the action had been brought for fraud against all the defendants and for damages, it was still within the power of a court of equity to relieve the plaintiffs from a mistake or error in procedure, especially after a discontinuance of the Missouri action, and where there had never been any act of ownership over the *res* since discovery of the fraud."[22]

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[19]243 N. Y. 295, 153 N. E. 79 (1926).

[20]Clark v. Kirby, 204 App. Div. 447, 198 N. Y. Supp. 172 (1st Dept. 1923).

[21]Quoting from Shappirio v. Goldberg, 192 U. S. 232, 242, 24 Sup. Ct. 259, 261 (1904).

[22]Clark v. Kirby, *supra* note 19, at 304, 153 N. E. 82.

These are radical, if not revolutionary, propositions. In a long line of cases[23] theretofore, the courts of this state had not thus liberally championed a plaintiff who "on points of practice and procedure" had "been barred from trying this case on the merits," nor until the decision of this case had impatience with a formalistic rule which had outgrown its function and out-lived its purpose,—which was inconsistent with common sense, and abhorrent to fair play, and which was certainly not in accord with the mores of the day—awakened the court to the realization that "Such a result leads to the immediate impression that something must be wrong in the application of our rules of law."[24] In the intervening period, nevertheless, the touch of common sense, exhibiting as might be expected a lack of precise logic, or of adequate authority, and in rebellious disregard of precedent, triumphed. The one doubt remaining is whether it represents but a casual relapse from rigid formalities induced by judicial sentimentality in "a hard " case and to be erased in the recoil from the explosion of an ancient doctrine by the "distinguishing" process, or whether it is indeed a deliberate reformulation of the doctrine of estoppel as applied to the principle of election of remedies. It is in connection with this question that the reasons stated in the case of *Clark v. Kirby* are illuminating. They seem to point to a new doctrine, eliminating that of election of remedies, in favor of a more liberal though more uncertain rule of estoppel, based on the actual instead of the presumed intention of the plaintiff. Such conclusion seems justified, yet unassured, because, while most of the reasons assigned by the court for its decision have support in precedent, some of them are built on ancient and erroneous foundation. It is difficult to be impressed with the proposition that the New York action for rescission constituted an election of remedies. It is familiar learning that the service of a complaint in an action at law constitutes an irrevocable election, irrespective of what may be said as to the real intention of the party. A contract having been thus affirmed cannot thereafter be disaffirmed.[25] In equity, however, the irrevocable security of disaffirmance is more lightly held. Vacillation will forfeit it. Intention to rescind must be firm, determined and unyield-

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[23]Bank of Beloit v. Beale, 34 N. Y. 473 (1866); Haydock v. Coope, 53 N. Y. 68 (1873); Fowler v. Bowery Sav. Bank, 113 N. Y. 450, 21 N. E. 172 (1889); Conrow v. Little, 115 N. Y. 387, 22 N. E. 346 (1889); Terry v. Munger, *supra* note 8.

[24]Clark v. Kirby, *supra* note 19, at 298, 153 N. E. 80.

[25]Terry v. Munger, *supra* note 8. In re Garver, 176 N. Y. 386, 68 N. E. 667 (1903); Clark v. Kirby, *supra* note 20.

ing. Intention is to be gathered from conduct, not from formulae which thrive in disregard of fact.[26]

Yet, as specifically applied to the doctrine of election of remedies, there is authority that even an equitable rescission may be irrevocable; that ratification thereafter is impossible. So, in *Moller v. Tuska*,[27] plaintiff sued to regain possession of a quantity of sugar. After the action had been commenced, plaintiff proved a claim in bankruptcy as for goods sold (involving the same merchandise), and received a dividend. Later, however, the claim was expunged and the dividend returned. Though it was argued, on the trial, that plaintiff had, by its subsequent conduct, affirmed the transaction, the court held:

> "The plaintiffs manifested their election by bringing this action. After that, the other way of redress was not open to them; for, according to Comyn (Dig. Elect. c., 2), if a man once determines his election, it shall be determined forever. Hence they could never successfully assert a claim against the purchaser under the contract, for the election to disaffirm it had been manifested, and to revoke it was not in their power. . . It would seem to follow that the subsequent transaction with the assignee in bankruptcy could have no bearing upon the question, first, because the plaintiffs were bound by their election. . ."[28]

It is, therefore, disquieting to find, in an opinion breathing so completely the liberalized air of equity procedure, a statement of doctrine so contrary to equitable principles, which require that, if the plaintiff choose rescission, he must act promptly, "announce his purpose *and adhere to it.*"

Such a view gives to rescission, by action commenced, greater and more decisive significance than disaffirmance by conduct or by any other means.

The case of *Clark v. Kirby* contains within itself surprising evidence of confusion of the logical with the estoppel theories of election of remedies. After stating that it was the action for rescission which "constituted the election of remedies, not the later action brought in Missouri,"[29] the court continued:

> "The reply served to the affirmative defenses set up in the answer raised issues of fact as to waiver and an abandonment which required a trial on the merits."[30]

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[26]Grymes v. Sanders, 93 U. S. 55 (1876); Shappirio v. Goldberg, *supra* note 20; McNaught v. Equitable Life Assurance Society of U. S., 136 App. Div. 774, 121 N. Y. Supp. 447 (2d Dept. 1910); Clark v. Kirby, *supra* note 20. *Cf.* Weigel v. Cook, 237 N. Y. 136, 142 N. E. 444 (1923); Schenck v. State Line Telephone Co., *supra* note 2.

[27]*Supra* note 7b, at 168.

[28]*Ibid.*, at 168–169.

[29]Clark v. Kirby, *supra* note 19, at 304.

[30]*Supra* note 19.

But how could there be waiver or abandonment, under the theory of *Moller v. Tuska*[31] and of *Clark v. Kirby*, [31a] both of which cases hold that an equitable rescission constitutes an election of remedies, unless, indeed, an election to disaffirm is revocable, whereas an election to affirm is irrevocable?

To assert, therefore, that an election in favor of an equitable remedy is irrevocable, has a hollow ring. Such a thought is fundamentally inequitable. It would have been more satisfactory, if it were not intended to establish a new rule, to have refused recognition to the claimed effect of the Missouri proceedings as an election of remedies because such proceedings were those of another state, as is the rule with respect to other actions pending,[32] or because in Missouri actions in affirmance and disaffirmance of contracts were not deemed inconsistent.[33] Again, the fact that there were differences in the defendants in the two actions constitutes no meritorious distinction, if previous precedents are to be regarded.[34] If the service of a complaint in the law action against even one of the defendants[35] was unauthorized, under the authorities it constituted an irrevocable election.[36] Even the reason assigned, that the action in Missouri was not inconsistent with the claim of rescission, because it asked for the return of the purchase price plus moneys expended in developing the property on the strength of the representations made, *and not for damages*, though plausible and sufficient as a valid distinction, loses force when it is borne in mind that many of the decisions upholding unintentional election were made while such doctrine was certainly not unknown.[37]

Whether or not this technical distinction constitutes the basis of the decision, and, therefore, minimizes the force of the more liberal grounds of the decision, is further shrouded in doubt, because the very same distinction was urged in a previous and recent case in the same court, but received no favorable recognition,[38] even though the Appellate Division, in that case, ruled, as it did in *Clark v. Kirby*, that "the answer and reply raise the point, without further necessity of

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[31] *Supra* note 7b. [31a] *Supra* note 19.

[32] Oneida County Bank v. Bonney, 101 N. Y. 173, s. c. *sub. nom.* Oneida County Bank v. Herrenden, 4 N. E. 332 (1886).

[33] This was alleged in the reply. [34] Terry v. Munger, *supra* note 8.

[35] The opinion indicated that there was no claim that the Missouri proceeding was unauthorized as against Corbin. [36] Terry v. Munger, *supra* note 8.

[37] Mack v. Latta, 178 N. Y. 525, 71 N. E. 97 (1904).

[38] Kline v. The Myriad Pictures Corporation, 211 App. Div. 550, 20 N. Y. Supp. 109 (1924), *aff'd.* without opinion, 240 N. Y. 667, 148 N. E. 751 (1924).

proof, and the question must be determined upon the pleadings alone."[39]

The sufficiency of the distinction made in *Clark v. Kirby* between rescission and affirmance at law rests on solid ground. It is predicated on the recognition of the fact that there may be rescission, both at law and in equity. The action at law, for money had and received, is based upon a *completed* rescission, whereas the remedy in equity is *for* a rescission. The one is executed; the other is executory. The distinction is supported by *Mack v. Latta*[40] and by other authorities,[41] in which it is pointed out that an action *for* a rescission can hardly be said, in itself, to constitute a disaffirmance, because, until and unless the court grants rescission, the contract is deemed to exist. Of course, it is obvious that, whether or not an action of rescission is deemed inconsistent with an affirmance of the contract, depends upon whether we view its effect, in the present, or in the future, if, as and when its purpose has been accomplished. The logical view regards

[39] *Ibid.*, at 551.

[40] *Supra* note 37.

[41] Houston Mercantile Company v. Powell & King 72 Misc. 358, 130 N. Y. Supp. 274 (Sup. Ct. 1911); Cohoon v. Fisher, 146 Ind. 583 (1896). In Michigan, joinder of causes of action for deceit and for rescission is permitted. In Glover v. Radford, 120 Mich. 542, 544, 79 N. W. 803 (1899) the Court said:

"These are the most important questions in the case, and we think there is error in both. There can be no doubt that the two theories are inconsistent in a sense, because one is based on the continuation of the contract and the other upon its rescission. The plaintiff attempted to rescind by tendering the stock and demanding the money that he paid for it. If there was fraud, he had the right to do this, provided he had not waived it and could put the defendants *in statu quo*. But he took the chance of being unable to convince the court and jury that he had not waived his right to rescind, and, if he should fail in this, he could not recover if he relied upon the single count, although the jury might find that he had been defrauded. If there was fraud, and he did not succeed in rescinding the contract, he certainly ought to have the right to recover damages for the injury he had suffered, if any. Had defendants consented to rescission, and acted upon it, the case would have been different, for there might then have been an estoppel; but there is nothing in the nature of an estoppel here. We have frequently held that one is bound by his choice between inconsistent rights or remedies, but, where there is no estoppel, this cannot usually be, unless the person really had a right of election. In this case, the plaintiff claimed that he had a right to rescind, and tried to rescind, but he did not succeed, either because he really had no such right or because he failed to seasonably assert it. He supposed that he had a remedy growing out of rescission, but it turned out that he was mistaken, and this left him the right to recover for the fraud, if there was fraud. This subject was discussed in *McLaughin v. Austin*, 104 Mich. 491; *Chaddock v. Tabor*, 115 Mich. 33; *Sullivan v. Ross' Estate*, 113 Mich. 316. It is a common practice to permit the joining of counts which state the cause of action differently, to prevent a possible variance between the declaration and the proof. The plaintiff should not have been required to elect between the counts of his declaration."

the purpose as accomplished. The estoppel view regards the ultimate effect, not the mere purpose.

In the Court of Appeals, the distinction seems to be partially regarded, in that it recognizes that an action at law, on a *completed* rescission, is consistent with an equitable action for a rescission,[42]—yet is partially disregarded, in that it declines to acknowledge that an equitable action *for* a rescission is consistent with an action at law, in deceit, in affirmance of the contract.[43] Accordingly, though now paying homage to "estoppel," as the basis for election of remedies, the Court of Appeals disowns the doctrine of those states (like Indiana), in which the rule is based on estoppel and harks back to the rule of logic of *Terry v. Munger*.

Yet, if it is illogical to join causes of action in deceit and *for* rescission, it would seem just as illogical (and, to our mind, more so) to permit an action *for* a rescission, when the plaintiff has already rescinded the contract without the aid of the court. What has been accomplished, does not need the aid of a court of equity to effectuate.

Finally, the fourth reason assigned, that, assuming the Missouri proceedings were for damages, equity could, nevertheless, relieve for mistake, is indeed in the teeth of precedent and in utter contempt of the formalistic doctrine of election of remedies. Once we abandon the rule of logic and test by the measure of actual intention, there is no longer a doctrine of election of remedies, but only the rule of equitable estoppel. Such, it is to be hoped, will be the emergent principle which no process of analysis or differentiation can obliterate. Technical distinction and differentiation is possible, but the essence of the decision is aptly put by Judge Crane, in the following words:[44]

> "All procedure is merely a methodical means whereby the court reaches out to restore rights and remedy wrongs; it must never become more important than the purpose which it seeks to accomplish. Unless some necessary requirement has been omitted, a wrong move or mistake in the method of seeking relief from the courts ought not to furnish protection for a wrongful act. . . There should have been a hearing on the merits. The action in Missouri, even if a slip or mistake, having been withdrawn, cannot be seized by the defendants as a substitute for good faith and honest dealing."

The utter hopelessness of the situation, in New York and elsewhere (where the rule of estoppel is not consistently applied), is well illus-

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[42]Clark v. Kirby, *supra* note 19, at 303, 153 N. E. 82.

[43]Merry Realty Co. v. Shamokin & Hollis R. E. Co., *supra* note 6.

[44]Clark v. Kirby, *supra* note 42, at 303, 304.

trated by a comparison of decisions like *Kittredge v. Grannis*[45] and *Urdang v. Posner*[46] in New York, and *Cohoon v. Fisher*,[47] in Indiana.

In the *Kittredge* case, plaintiff, on a first trial, proceeded in tort. His judgment having been reversed, he proceeded on the new trial in contract, waiving the tort. The result was that, whereas, previously, it had been held that judgment could not be entered against a partner who had not been served,[48] now, since the action was in contract,[49] it could be. The court held that there had been no election of remedies, because "The right of the plaintiffs to waive their cause of action in tort and found their right to recover upon contract, whether express or implied, is unquestionable, and there is no power either with the defendant or in the court to compel them to proceed upon the tort."[50]

Yet, if this be so, (and the authority of this case, however desirable the result, it must be conceded, has been impaired by its fate in the Court of Appeals), what becomes of the doctrine of *Terry v. Munger*? Here there is no room for distinctions, based on the principles of equitable jurisdiction. Here, as in *Terry v. Munger*, the election was between legal remedies, one passing the title and the other retaining the title, but here it was the second and subsequent action, instead of the first and prior action, which waived the tort and operated to pass the title. Here, then, we have waiver and abandonment in a law action, by means of the operation of the fiction of waiver of tort, and thus, in a law action, we have a type of election of remedies which is not irrevocable. Furthermore, since the rights involved are not contractual nor induced by fraud, this phenomenon of revocability is not to be harmonized by any supposed discrimination between cases involving title to property, and cases involving contractual relations induced by fraud, and for which there is a concurrent remedy in equity. Equitable principles do not apply and, therefore, equity can offer no solution to satisfy the craving for a discrimination in logic. Nor is there any solace in the fact that the revocation of the election was made by an amendment of the complaint. If the mere service of the complaint constituted an irrevocable election, then its amendment could not retroactively rob it of its inevitable legal

[45]215 App. Div. 491, 214 N. Y. Supp. 25 (1926), *rev'd* on other grounds, utterly unrelated to the subject of this discussion in 244 N. Y. 182, 155 N. E. 93 (1926).

[46]220 App. Div. 609, 222 N. Y. Supp. 396 (1st Dept. 1927), *aff'd* without opinion in 247 N. Y. 565, 161 N. E. 184 (1928).

[47]*Supra* note 41.

[48]200 App. Div. 478, 193 N. Y. Supp. 84 (1st Dept. 1922). *Cf.* Civ. Prac. Act, § 1197.

[49]Civ. Prac. Act, § 1197.

[50]Quoting from People v. Wood, 121 N. Y. 522, 529, 24 N. E. 952, 953 (1890).

consequence. The effect of the service of the pleading did not hang in abeyance to be measured by subsequent events, which might never occur.

In *Urdang v. Posner*,[51] a complaint pleading a cause of action for money had and received, as on a completed rescission, by reason of defendant's fraud, was amended on the trial, to state a cause of action for fraud and deceit, thus eliminating the allegation of rescission. The amendment was allowed, and the judgment in favor of plaintiff sustained by the Court of Appeals. It was said that plaintiff, having disaffirmed, might affirm,—a sensible enough conclusion, but contrary to the principle of *Moller v. Tuska*[52] and to at least one of the principles formulated in *Clark v. Kirby*.[53] Here, again, the waiver of the attitude of disaffirmance was recognized and enforced in a court of law, without the aid of equitable principles, but, it is true, on the theory that, in fact, plaintiff never did have a remedy based on rescission. The court said:

> "It is the respondent's contention that by commencing an action upon the theory of rescission of the contract, the plaintiff had made an irrevocable election of remedies and could not thereafter assert a cause of action upon a different theory. The defendant did not claim surprise or prejudice at the trial when the plaintiff moved to amend the complaint and there was present no compelling reason for holding the plaintiff to an irrevocable election of remedies. The facts show that the plaintiff had, after knowledge of the alleged fraud, continued to use the violin. He, therefore, in effect had ratified the purchase, and hence although he had suffered damage through a fraud he did not have a cause of action for recisission. In drawing his complaint on the theory of rescission, therefore, he was pursuing a mistaken and ineffectual remedy. Such a choice does not constitute an irrevocable election of remedies."[53a]

The result is to be commended, but the reasoning process is not that of *Terry v. Munger* nor that of *Clark v. Kirby*. Plaintiff did rescind, but because, by his conduct, he could not succeed, his rescission must be deemed futile. The fact of rescission is confused with the right to rescission and that right determined by subsequent conduct, which waived it. The negation of the application of the doctrine, in this case, denies the doctrine itself. If, where based upon the same facts, inconsistent remedies are available, and the irrevocability of the choice made is dependent upon effectiveness of the remedy chosen, determined by a subsequent investigation of the evidentiary facts,

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[51] *Supra* note 46.
[52] *Supra* note 7b.
[53] *Supra* note 42.
[53a] *Supra* note 46, at 611.

then we have, indeed, passed on, though we refuse to admit it, from election by logic to election by estoppel.

In *Cohoon v. Fisher*,[54] it was held that an election to disaffirm, evidenced by a suit for rescission in equity, was revocable, so that an amendment of the complaint, which converted the action into one for deceit at law, was proper. The court distinguished the cases holding that an action at law constituted an irrevocable election, on the ground that such an action constituted an affirmance of the contract. This case, therefore, is in conflict with *Clark v. Kirby*,[55] to the extent that the *Clark* case holds (if it does) that an action of rescission constitutes an irrevocable election of remedies. We quote from the *Cohoon* case, because it well illustrates the other point of view and demonstrates the uncertainties of legal logic:

> "In that case, like this, the action was brought to rescind a contract for fraud; afterwards the complaint was so amended as to make it a complaint to recover damages for the fraud. The answer set up the original complaint as a conclusive election of remedies in bar of the amended complaint. But it was held that such election to be a bar must have been prosecuted to judgment.
>
> A long list of adjudications is cited by counsel, decided in other jurisdictions, apparently establishing a different rule. We are asked to follow those cases without a word of explanation as to how we are to escape the force of our own previous decision above referred to. . .
>
> But our case in 124 Ind. is supported on the point in question by an extensive citation of decisions, both in this country and England, and those decisions are directly in point. The facts in the cases cited by appellee's counsel as supporting the contrary rule, or at least so many of them as appear at all to be in point, are just the reverse of the facts in this case or those in *Nysewander v. Lowman*. . . and cases therein cited. That is, in the cases cited by appellee, the first suit was brought to recover damages for the fraud perpetrated in the procurement of the contract. After abandoning such suit another suit was brought seeking a rescission of the same contract on account of the same fraud. But in the case now before us, and the one decided in 124 Ind., the suit for rescission was brought first, which was abandoned in the amended complaint and instead a complaint for damages on account of the same fraud was substituted.
>
> It is true, in such a case, the injured party has a choice of either of the two remedies mentioned, but it does not necessarily follow that a mere choice of one by bare commencement of proceedings under it, without prosecuting it to a conclusion, precludes a resort to the other. Nor does it follow that because such preclusion does not arise in all cases that it may not arise in some

[54] *Supra* note 41.

[55] *Supra* note 19.

cases. The facts of the cases to which appellee's counsel have referred us, are either directly opposite to the facts in the case now before us, or are of such a character as to make the rule laid down in one of them applicable, the same as it is applicable to the case now before us. That rule is stated in *Nat. Bank of Illinois v. First Nat. Bank of Emporia* (57 Kan. 115, 45 Pac. 79). . ., and is stated thus:

> 'A man may not take contradictory positions, and where he has the right to choose one of two methods of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge, or means of knowledge, of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again.'

Now how does the choice of the remedy of rescission involve the negation or repudiation of the remedy of a suit for damages for the fraud? No one will deny the right to abandon a suit for rescission. [*But see Moller v. Tuska*,[56] *in New York*.] Its abandonment involves the affirmation of the contract. Then if the plaintiff may abandon it and thereby affirm the contract, that is all he does when he sues for the damages caused by the fraud in the procurement of the contract. . . .

It is thoroughly settled in this state, and everywhere under our system of jurisprudence, that a suit for damages on account of the fraud is a ratification or affirmation of the contract. [*But see Clark v. Kirby*[57] *in New York*.] . . .

Therefore, there is much reason in holding, as the cases cited by appellee's counsel do, that an action begun to recover damages resulting from the fraud in procuring the contract is so inconsistent with a subsequent action to rescind the contract for the same fraud, that it cannot be maintained, even though the first action was abandoned before judgment. When the contract is affirmed and ratified by the injured party by such action, it then becomes binding on him and is no longer voidable, and hence, he cannot afterwards maintain a suit to rescind it. If the commencement of the suit for damages resulting from the fraud amounts to a ratification and affirmation of the contract, as we have seen it does, then there is much reason for holding the plaintiff precluded from the remedy of rescission without showing that the first suit was prosecuted to final judgment. Not so, however, if the first suit is for rescission. Its commencement is nothing more than a bare choice of remedies. Its commencement and abandonment before final judgment are not inconsistent with the continued subsistence of the contract, or a subsequent suit affirming such contract. There may be cases in other jurisdictions establishing a different rule, making the com-

[56]Italicised matter in brackets interpolated by us.

[57]Italicised matter in brackets interpolated by us.

mencement of either suit first a conclusive choice of remedies without prosecution to final judgment. But we are of the opinion that the better rule is that established in this state, and we adhere to it.

All we mean to hold as to the point now under consideration is, that the cases cited by appellee are not necessarily inconsistent with the conclusions we have reached, and if they were our own previous cases would and ought to control this case, supported as it is by both reason and authority."[53]

In this setting, it is plain that a remedy for election of remedies is sorely needed. It seems Utopian to expect decisive and wholesome relief from the courts. This is said, not in criticism, but in recognition of the "nature of the judicial process." The ship of the law must be tied to ancient moorings. Changes in tide may deflect it somewhat, but some fixation there must be, or its course will indeed by uncharted. To revert to our previous metaphor, at the risk of literary error, the task before us requires a ploughing of the soil, which will uproot the weeds which have dug deep into it. That function is peculiarly that of the legislature, and only from it, at this date, is it possible to expect an immediate advance to a system in which procedural parasites do not strangle the substantive rights of the parties.

The legislative enactment which will guarantee a sane view of the fundamental rights involved in the doctrine of election of remedies must be based on a recognition of the modern transformation of that theory. It cannot ignore the practical utility of the means to accomplish the end, nor can it fail to maintain the auxiliary function of practice rules to accomplish that end. A determination of the *merits* of controversies, according to law, is the end in view. Procedure, properly administered, is always subordinate to that purpose. It never becomes the goal in itself. Properly administered, it is the pathway through the obstructions of controversy to the goal of decision; improperly administered, it is a barricade to progress and amicable understanding, and the occasion for disrespect by those who encounter it. It will not do to fall back on so-called fundamental principles, which in final analysis, are the rules of procedure heretofore obtaining, as do some who revel in the decorative order of the Stone Age. Principles of practice must be translated into units of utility according to modern standards, in order to be fairly tested. Utility tests the very truth of the practice principle involved. It created the principle and when the times require it, will destroy it and set up a new one. The test lies, not in *a priori* assumption,

[53]Cohoon v. Fisher, *supra* note 41, at 586 ff.

but in experience; not in fundamentals, but in practicability; not by standards set in a period not at all comparable, but in the present ever so much complicated by twentieth century social conditions.

We have passed on from the view that controversies may be dissected into constituent elements, each fitted into a form of action, known as a remedy or cause of action. On the contrary, we now realize that controversies remain the same in essence and in proof, whether we label them, "at law" or "in equity," "on *completed* rescission" or "*for* rescission," "in quasi-contract" or "in tort." The fiction which made it possible that a right invaded should be forced into a mould, so that the wrong might receive redress, has served its purpose. Today, there must be redress for the wrong without regard to the form of the remedy. The remedy no longer marks the limits of justice. It is the right which dictates the ever expanding limits of the remedy, whatever the form.

That being so, there is no reason for the continued existence of the outworn doctrine of election of remedies. Not even the amelioration induced by equitable principles satisfies the dictates of a modern justice. That which equity can do, law should be able to accomplish. Justice, according to law, should not be different from that according to equity. The doctrine of election of remedies should be abolished, except where it reaches the dignity of *res adjudicata* or of equitable estoppel. These limitations are right, because a plaintiff who has proceeded to judgment should be held bound, in subsequent actions against the same parties, by the meritorious adjudication. He has had his day in court, and the defendant is entitled to a respite from litigation. But, short of *res adjudicata* and equitable estoppel, the continuance of the rule can serve no purpose but to defeat rather than promote justice.

Concretely put, the legislative enactment to accomplish this purpose, might read as suggested in the caption. The phrase "or by law otherwise prevented" takes care of statutes of limitation and legislation in general. The special definition of "former adjudication" is to assure regard for substance and not for form.